IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELYNN YORK, Appellant v. RON STORY, LOUIS MORENO and HENRY GROTE, Appellees.	No. 18280 ✓ BRIEF OF APPELLANT ANGELYNN YORK

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JURISDICTION

The jurisdiction of the Federal District Court was asserted under the Civil Rights Act, 42 U.S.C. §1983 and under 28 U.S.C. §1343 and 1331. The District Court denied jurisdiction on the ground that the Complaint did not state a cause of action under the Civil Rights Act. This Court has jurisdiction to review the District Court's decision pursuant to §§1291 and 1298 of Title 28 of the United States Code.

THE CASE

Appellant filed her Amended Complaint for Damages under the Civil Rights Act, 42 U.S.C. §1983 in the Federal District Court for the Southern District of California on

June 8, 1962 (Tr. R. pp. 9-14). Upon motion of Defendants, the Court, by Order dated June 26, 1962, dismissed the action (Tr. R. p. 15).

The sole question on appeal is whether Appellant's Amended Complaint, which for convenience is reproduced below, states a cause of action under the Civil Rights Act:

AMENDED COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS

The plaintiff complains of the defendants and alleges:

I

Plaintiff is a citizen of the United States.

II

The defendants are officers of the Police Department of the City of Chino, State of California; the defendants Story, Moreno and Grote being police officers; they will be hereinafter so designated; at all times herein said defendants acted under color of authority as such officers.

III

This Court has jurisdiction herein under the Federal Civil Rights Act, 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4).

IV

In October, 1958, the plaintiff went to the police department of the City of Chino, for the purpose of filing charges in connection with an assault upon her.

She was advised by the defendant Story, that it was necessary to take photographs of her; he took the plaintiff in said police station, locked the door and directed the plaintiff to undress. Thereupon he took photographs of the plaintiff in the nude. He directed the plaintiff to take various indecent positions, one of which was sitting in the nude, with her legs spread apart; thereupon said defendant took photographs of the plaintiff in that and other positions. Said photographs were not made for any lawful or legitimate police purposes. Said photographs are referred to herewith, incorporated herein as though fully set forth and contact print copies of three of them are attached hereto as Exhibit I. (Because of their nature said prints are attached hereto in a sealed envelope and request is hereby made that said prints be not examined by others than the Court and by counsel save upon order of Court.)

The plaintiff objected to being undressed, and stated to said defendant that there was no need to take photographs of the plaintiff in the nude, or in the positions aforesaid, because the bruises would not show up in any photograph.

A policewoman was present at said police station, but was not requested to be present in the room where the pictures were taken, and was not present in said room; nor was any other person, other than the plaintiff and said defendant.

Thereafter, and in October, 1958, said defendant advised plaintiff that the pictures did not come out and that they were destroyed by him.

Instead, said defendant circulated said photographs among the personnel of the police department of the City of Chino.

In April, 1960, the defendants, Moreno and Grote, at said police station in Chino, using police photographic equipment, made duplicates of said photographs, and thereupon and thereafter, circulated said duplicates among the personnel of the Chino Police Department.

The plaintiff did not learn of the action of the defendants, Moreno and Grote aforesaid, nor the action of the defendant Story aforesaid, pertaining to the circulation by him of the photographs, until December of 1960.

V

All of the acts of the defendants aforesaid were as police officers of said Chino Police Department; but were in excess of their authority as such police officers. Said acts violated and deprived plaintiff of her right to privacy and liberty and constituted an unreasonable search and seizure contrary to and prohibited by the Fourth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act.

VI

The acts of the defendants aforesaid were committed

unlawfully, intentionally, maliciously and oppressively, with the knowledge on the part of the defendants that they were exceeding their authority as police officers and with the further knowledge that they were depriving the plaintiff of rights guaranteed to her by the Constitution of the United States and by the Federal Civil Rights Act by virtue whereof the plaintiff is entitled to punitive and exemplary damages.

WHEREFORE, the plaintiff prays for damages as to each of the defendants as follows:

1. The sum of Ten Thousand Dollars ($10,000.00) as actual damages;

2. The sum of Fifteen Thousand Dollars ($15,000.00) additional as punitive damages;

3. For costs of suit herein; and

4. For such other and further relief as to the Court seems just and proper.

SPECIFICATION OF ERROR

1. The Trial Court erred in granting Appellees' motion to dismiss the Amended Complaint and in dismissing the action.

2. The Trial Court erred in holding that it lacked jurisdiction of the cause of action stated in Appellant's Complaint.

3. The Trial Court erred in failing to hold that

Appellant's Complaint states a claim for redress for the invasion of constitutionally safeguarded rights.

4. The Trial Court erred in holding that an invasion of privacy, not an incident, to an arrest, search or seizure is not proscribed by the Fourth Amendment.

5. The Trial Court erred in failing to hold that Appellant's Complaint states a claim for invasion of privacy incident to an unlawful search.

6. The Trial Court erred in failing to hold that Appellant's Complaint states a cause of action for the denial of her liberty without due process of law.

SUMMARY OF ARGUMENT

The Court below held that Appellant had failed to establish Federal jurisdiction because of her failure to state a claim upon which relief could be granted under the Civil Rights Act (42 U.S.C. §1983). Appellant did not, the Trial Court held, allege the violation of a federally protected right. It is submitted that the invasion of Appellant's privacy by officers of the Chino police department as described in the Complaint, did constitute a violation of Appellant's constitutional rights. The decisions and statements of numerous courts, including the United States Supreme Court, establish the proposition that an individual's right of privacy is protected against infringement by officers of the State. This protection

exists because the concept of liberty embodied in the Fourteenth Amendment includes within it the individual's right of privacy. Furthermore, the very core of the Fourth Amendment, which is applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment, is the protection of the right of privacy. Thus, the Trial Court erred when it ruled that Appellant had not stated a cause of action under the Civil Rights Act because the invasion of privacy alleged in her Complaint did not occur incident to an unlawful arrest, search or seizure. Even if the Trial Court's determination were correct on this ground, the Court erred in not recognizing that the alleged invasion of privacy did occur as an incident to an unlawful search.

ARGUMENT

APPELLANT'S AMENDED COMPLAINT CONTAINED AVERMENTS SUPPORTING FEDERAL JURISDICTION BY STATING A CLAIM FOR REDRESS FOR THE INVASION OF CONSTITUTIONALLY SAFEGUARDED RIGHTS.

The jurisdiction of the District Court over this case is predicated upon the provisions of 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 1331. In order to sustain jurisdiction under these statutes, Appellant was required to state a claim for relief under 42 U.S.C. §1983, the Civil

Rights Act. It is submitted that she did so.

In order to state a claim for relief (and thereby establish Federal jurisdiction) under §1983 it is necessary to establish (1) that the defendant acted under color of law and (2) that the plaintiff was deprived of any of the rights, privileges or immunities secured by the United States Constitution or laws. [1]

That the Complaint adequately alleges State action does not appear to be in dispute. It would indeed be difficult to maintain seriously that the Complaint is defective in this regard. It is alleged that Appellant went to the Chino Police Department to report an assault

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1 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

upon her, that the obnoxious photographs were then made by and at the direction of defendants who are members of the Chino Police Department, and that police equipment and facilities were utilized by defendants in producing such photographs. Under these circumstances, clearly, the defendants were clothed with State authority and they purported to act thereunder. Accordingly, their conduct was engaged in "under color of State law." Monroe v. Pape, 365 U.S. 167, 184 (1961); United States v. Classic, 313 U.S. 299 (1941).

The District Court's determination that Appellant had failed to state a claim upon which relief could be granted did not rest upon Appellant's failure to allege conduct "under color of law." The Court's determination rested entirely upon the grounds that Appellant had not alleged a violation of a federally protected right. In so holding, it is respectfully submitted, the Trial Court erred.

A. THE COMPLAINT ALLEGED THE VIOLATION OF RIGHTS SECURED TO APPELLANT BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Unquestionably, the States are subject to the limitations imposed by the Fourth Amendment. Monroe v. Pape, Supra, 365 U.S. 167, 171, and Mapp v. State of Ohio, 367 U.S. 643 (1961). The Trial Court recognized this proposition, but held that the Fourth Amendment does not

prohibit the States from committing an invasion of privacy such as that alleged by Appellant in her Complaint.

Yet the right of privacy is the essence of the Fourth Amendment. The United States Supreme Court has made this proposition abundantly clear in Mapp v. State of Ohio, Supra.

In Mapp, the Court overruled Wolf v. Colorado, 338 U.S. 25 (1949), and held that the "Weeks doctrine" (Weeks v. United States, 232 U.S. 383 (1914)) is an essential part of the Fourth Amendment, and, as such, must be applied to State prosecutions. (Weeks had held illegally obtained evidence to be inadmissible in Federal prosecutions.) The terms in which the Court in Mapp stated its holding reveal how completely the Court equated the guarantees of the Fourth Amendment and the right of privacy:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the State through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government . . . . without that rule (the Weeks rule) the freedom from State invasions of privacy would be so ephemeral . . . as not to merit this Court's high regard as a freedom

'implicit in the concept of ordered liberty.'"
367 U.S. at p. 655 (emphasis supplied).

Developing this thought the Court emphasizes further the importance of the right of privacy to a "system of ordered liberty":

> "Indeed, we are aware of no restraint similar to that rejected today conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society. . .'
> 367 U.S. at p. 656 (emphasis supplied).

In its concluding statements in this portion of the opinion, the Court stressed again the constitutional nature of the right of privacy:

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States and that the right to be secure against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise."
> 367 U.S. at p. 660 (emphasis supplied).

It is interesting to note that the Mapp Court's disagreement with the Wolf Court related only to the manner of enforcing against the States the rights guaranteed by the Fourth Amendment. As to the basic nature of those rights, both Courts were in perfect agreement, for in Wolf the Court said:

> "The security of one's privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment - is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 349 U.S. at p. 27.

The sentiment of the Wolf Court, in this regard, was reiterated by the Ninth Circuit in the recent Civil Rights Act case of Cohen v. Norris, 9th Cir. (1962), 300 F. 2d 24, 31.

The significance of the Mapp opinion in the case at Bar is not diminished by the fact that Mapp dealt with the application of the exclusionary rule rather than Civil Rights Act liability. For the Civil Rights Act and the exclusionary rule are but separate tributaries of the same main stream.

The exclusionary rule applied in Mapp is not an end in itself. It is only an instrument, a judicially

constructed tool designed to protect the essential right of privacy which the Mapp Court found to be at the core of the Fourth Amendment. Now this same right of privacy is also protected by another device which is the creature of another segment of our legal system. The civil liability, imposed under the Civil Rights Act, is an instrument which Congress has designed to encourage the police to abide by the Constitution. And, in some circumstances, this instrument may be even more effective than the exclusionary rule in achieving the desired goals.

The exclusionary rule is inherently limited in that it is operative only when a lawless police action is followed by criminal prosecution of the victim. But grave infringements of Fourth Amendment rights may incur without subsequent prosecution. The infringement of a citizen's constitutional rights by a police officer, acting as such, is at least as reprehensible when done to further the policeman's personal interests as when done for the purpose of securing evidence for criminal prosecution.. The Civil Rights Act tends to deter the unlawful action in both cases while the exclusionary rule is applicable only in the second.

In brief, then, the Civil Rights Act and the exclusionary rule are clearly parallel remedies, both

designed to insure that constitutional rights are not destroyed by those whose duty it is to uphold them. Thus, the constitutional principles enunciated in an opinion dealing with the exclusionary rule are equally applicable to a case arising under the Civil Rights Act.

The opinions rendered in Mapp, Wolf and Cohen thus demonstrate that the Trial Court's technical and narrow construction of the Fourth Amendment limits unduly the protection which it is designed to provide. Although the defendants in the instant action committed an unlawful search, it was not necessary (as the Trial Court thought,) (Tr. R. p. 7, ll. 17-21) for Appellant to allege the occurrence of such a search in order to state a claim under the Civil Rights Act for the infringement of her "Fourth Amendment rights." If Appellant's Complaint had alleged nothing more than the unjustified and unprivileged invasion of her privacy by State officers, it would have set forth an infraction of Fourth Amendment guarantees as defined by the United States Supreme Court.

In fact, however, the Complaint alleges the occurrence of an unlawful search conducted by the State officers. By deceit and subterfuge the officers succeeded in inducing Appellant to undress and to have the offensive photographs made as described in the

Complaint. Such fraudulently obtained access to matter otherwise hidden from view clearly constitutes an unlawful search. Fraternal Order of Eagles No. 778 v. United States, 3 Cir. 1932, 57 F. 2d 93. See also Bielicki v. Superior Court of Los Angeles County, 50 Cal. 602 (1962) and Britt v. Santa Clara Superior Court, 58 A.C. 480 (1962).

In Fraternal Order, prohibition agents were admitted to the lodge rooms of the Order under the false representation that they were members in good standing of another Lodge. While there they were served drinks. Thereafter, based on what they had drunk and seen on the premises, the officers obtained a search warrant. In reversing the Trial Court which had permitted in evidence the objects seized pursuant to the search warrant in an injunction action under §22 of the National Prohibition Act (former 27 U.S.C. §34), the Court said, at page 94:

> "The search and seizure in the instant case were based on the information secured through the entry gained by false representation . . . When the agents first entered they searched with their eyes and saw the very thing they were looking for. This they had no right to see and when illegally seen they had no right to use it as the probable cause to secure a search warrant . . . "

In the case at Bar, as in Fraternal Order, the officers by false representation gained access to what was otherwise hidden from their view. Following this, there was an "invasion and quest, a looking for or seeing out . . . " (Bielicki, 58 Cal. at p. 605); a searching by the officers with their eyes and a seeing of the very thing they were looking for.

In short then, there was a search and that search was unlawful and unreasonable. Thus, even if the Fourth Amendment is to be read as technically as it was by the Trial Court; even if its limitations do not come into play absent "an arrest or search or seizure," (Tr. R. p. 7, l. 19) the allegations disclosed by Appellant's Complaint do spell out an actionable infraction of the valuable rights which the amendment preserves.

B. APPELLANT'S COMPLAINT STATES A CAUSE OF ACTION FOR DENIAL OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT, EVEN WITHOUT REFERENCE TO THE FOURTH AMENDMENT.

In a number of cases the application of the Civil Rights Act has rested upon the Fourteenth Amendment without particular reference to the Fourth Amendment. An invasion of personal liberty and security which may, perhaps, not run afoul of Fourth Amendment

guarantees, may nevertheless violate the Fourteenth Amendment's commandment that no State shall "deprive any person of life, liberty or property without due process of law." Thus in Hardwick v. Hurley, 7th Cir. (1961), 289 F. 2d 529, plaintiff claimed that his rights under the Due Process Clause had been violated when he was beaten by police for refusing to take a drunkometer test. It was argued that plaintiff had failed to state a cause of action because of his failure to assert that the assault was incidental to an arrest, search or seizure. Nevertheless the Court, following Monroe v. Pape, Supra, held that the allegations of the Complaint stated a cause of action under the Civil Rights Act. In McCollum v. Mayfield, N. D. Cal. 1955, 130 F. Supp. 112, plaintiff's Complaint alleged that plaintiff had been denied adequate medical care while he was held in jail pending trial. The Trial Court held that such treatment constitutes "a deprivation of life, liberty, and of property. Since these rights are protected by the Fourteenth Amendment to the Federal Constitution, the Complaint sufficiently alleges the deprivation of a right . . . . secured by the Constitution and laws of the United States." See also Coleman v. Johnston, 7th Cir. (1957), 247 F. 2d 273 and Geach v. Moynahan, 7th Cir. (1953), 207 F. 2d 714.

In the case at Bar, as in the cited cases, the

Complaint sufficiently alleges (1) that the offensive action was taken by State officers acting under color of law and (2) that Appellant's rights under the Fourteenth Amendment were violated. There appears to be no dispute as to the adequacy of the Complaint's allegations of "State action," and this point needs no elaboration here. (See pages 11-12, Supra.)
The Trial Court, however, failed to recognize the second portion of the preceding proposition, viz. that Appellant's Fourteenth Amendment rights had been infringed.

Appellant's rights under the Fourteenth Amendment were violated when the officers, without justification, privilege or license, encroached upon Appellant's privacy. In so doing, they denied her, without due process, the personal liberty guaranteed to her by the Fourteenth Amendment. Authority teaches that the protection of liberty granted by the Fourteenth Amendment includes the right of privacy. This proposition was confirmed by the Fifth Circuit in Colgate Palmolive Company v. Tullos, 5th Cir. (1955), 219 F. 2d 617. The plaintiff had sued for damages caused by the unathorized publication of her photograph in a newspaper advertisement. On appeal it was claimed that plaintiff's Complaint did not state a cause of action. The Court

of Appeals held that plaintiff had stated a cause of action for the invasion of her right of privacy, which is a legally protected interest, guaranteed by the Fourteenth Amendment of the United States Constitution.

In so holding the Circuit cited and followed the decision of the Georgia Supreme Court in Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S.E. 58 (1904). Pavesich was a landmark case in the effort to establish privacy as a legally protected interest. Indeed it marked the first recognition of the right of privacy by a court of last resort in the United States. (Gouldman Taber Pontiac Inc. v. Zerbst, 213 Ga. 682, 100 S.E. 2d 881 (1957.)

The Pavesich case arose as an action for damages caused by the defendants' unauthorized use of plaintiff's photograph in an advertisement. The central issue facing the Court was, as in the Colgate Palmolive case, the very existence of a cause of action for privacy. In reaching its decision that privacy is a separate and legally protected interest, the Georgia Supreme Court examined closely the concept of personal liberty. It found that privacy is an element of such liberty, and that it is guaranteed by the Fourteenth Amendment:

"The right to withdraw from the public gaze at such times as a person may see fit when

his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. In Wallace v. Roway Company, 94 Ga. 732, it was said: 'Liberty of speech and writing is secured by the Constitution and incident thereto is the correlative liberty of silence, not less important nor less sacred.' The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons within the State of Georgia by the Constitution of the United States and the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." 122 Ga. at pp. 196-7, 50 S. E. at pp. 70-1. (Emphasis supplied.)

See also McDaniel v. Atlanta Coca Cola Bottling Company, 60 Ga. App. 92 (1939), 2 S. E. 2d 810.

The United States Supreme Court has not had

occasion to render a decision on the precise question discussed herein. It has, however, expressed its view upon the matter and has stated clearly that the right of privacy is secured by the Fourteenth Amendment. In Frank v. Maryland, 359 U.S. 360 (1959), the Court had occasion to comment upon the history of those provisions of the Constitution which bar unreasonable searches. In the course of this discussion the Court made the following statement which is significant to our inquiry as to the constitutional nature of the right of privacy:

> "Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions . . . that the great battle for fundamental liberty was fought. While these concerns for the individual rights were the historic impulses behind the Fourth Amendment and its analogues in State Constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the

Fourteenth Amendment are, of course, not restricted within these historic bounds." 359 U.S. at p. 365-6. (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the decision of the Trial Court should be reversed and that the case be remanded for a hearing under the Civil Rights Act.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Albert J. Fink

(Affiant's signature)

Subscribed and sworn to before me this

day of , 19

Notary Public in and for said County and State of California
(SEAL)

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

(Signature)

Executed on
(date)

at , California
(place)

◆

copy of the within this day of 19

Attorney for

copy of the within this day of 19

Attorney for

◆

AFFIDAVIT OF SERVICE
BY MAIL — 1013a, C. C. P.

STATE OF CALIFORNIA
COUNTY OF Angeles } ss.

being first duly sworn says: that affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's
residence
business address is: 9171 Wilshire Blvd
Beverly Hills, California

That on January 16, 1963

affiant served the within brief

on the Appellee in said action, by placing a true copy thereof

enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at

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(Affiant's signature)

Subscribed and sworn to before me this

day of , 19

Notary Public in and for said County
and State of California

CERTIFICATE OF SERVICE
BY MAIL — 1013a. C. C. P. (2)

ALBERT J. FINK
certifies that he is an active member of the State Bar of California, counsel in this cause, and not a party thereto, and that h IS *

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